In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 337

ST. JOHNS MOTOR EXPRESS CO., APPELLANT, AND JAMES J. WILLIAMS, INC., AND CONSOLIDATED FREIGHTWAYS, INC., INTERVENING APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE, AND INTERSTATE COMMERCE COMMISSION, EVERTS' COMMERCIAL TRANSPORT, INC., AND INLAND PETROLEUM TRANSPORTATION COMPANY, INC., INTERVENING APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the judgment of a three-judge court which sustained an order of the Interstate Commerce Commission awarding certificates of public convenience and necessity to Everts Commercial Transport, Inc. (Everts) and Inland Petroleum Transportation Company, Inc. (Inland).

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During 1955 and 1956, ten motor carriers, including Everts, Inland, and the intervening appellant, Consolidated Freightways, Inc. (Consolidated), separately applied for Commission authorization to engage in tank truck transportation of chemicals in various areas in the twelve westernmost States. Although the applicants filed independently, the requested commodity and geographical authorizations overlapped considerably. After hearings on each application, several examiners' reports were filed. The examiner who had presided at the separate hearings involving the Everts and Inland applications recommended their denial. On exceptions to the various examiners' opinions, the Commission's Division 1 issued a consolidated report on all of the applications (except that of Consolidated), which, *inter alia*, granted the applications of Everts and Inland (72 M.C.C. 599). The full Commission, on reconsideration, affirmed, with minor modifications not here relevant, and also granted the Consolidated application (78 M.C.C. 717).[1]

In a *per curiam* opinion, the district court affirmed, adopting as its own the Commission's findings and conclusions pertinent to the Everts and Inland applications and declaring them to be "amply supported" by the evidence (J.S. 15–16).

1. Appellants' principal contention is that the Commission failed to consider or make required findings as to whether the grant of additional operating authority to Everts and Inland would impair the operating abil-

[1] For the Court's convenience, additional copies of the Commission's report are being lodged with the Clerk.

ity of existing carriers and thus fail to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation among the several carriers" as required by the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, 1001.

We stress, at the outset, that there is no requirement that the Commission, in passing upon common carrier applications filed under Section 207 of the Interstate Commerce Act (49 U.S.C. 307), couch its ultimate findings and its conclusions in the express terms of that Policy.[2] See *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 240–1; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 522, 530–532. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, stands merely for the proposition that the Commission's report must show that its order has a rational basis when viewed in light of the statutory criteria.

The Commission is, of course, required to *consider* the National Transportation Policy in any licensing

[2] In contrast, § 209 (49 U.S.C. 309), dealing with certification of motor *contract* carriers, expressly requires findings in terms of the National Transportation Policy.

[3] See also, to the same effect, *Dickinson Transfer and Storage Co.* v. *United States*, 42 F. Supp. 215, 218–219 (E.D. Pa.), affirmed, 317 U.S. 587; *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448, 451 (N.D. Cal.), affirmed, 323 U.S. 668; *Beard-Laney, Inc.* v. *United States*, 83 F. Supp. 27, 31–32 (E.D.S.C.), affirmed, 338 U.S. 803; *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 760–761 (E.D. Va.), affirmed, 340 U.S. 802; *Southern Kansas Greyhound Lines* v. *United States*, 134 F. Supp. 502, 506–509 (W.D. Mo.), affirmed, 351 U.S. 921; and *Luckenbach Steamship Co.* v. *United States*, 122 F. Supp. 824, 827–829 (S.D.N.Y.), affirmed, 347 U.S. 984.

proceeding. See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82–84, 86–87; *Schaffer Transportation Co.* v. *United States*, *supra*. But the Commission here expressly stated in its report that it had "constantly kept in mind our responsibilities under the national transportation policy" and that "it goes without saying that the purposes of the policy must be considered in all proceedings of the character here presented" (78 M.C.C. 717, 765). Examination of other portions of the report reveals that the Commission, with respect to both the Everts and Inland applications, considered not only the applicants' qualifications (78 M.C.C. at 721, 726) and the shippers' needs for the proposed services (78 M.C.C. 721–723, 726–730), but also the alleged effect of granting these applications upon the opposing carriers, including appellant St. Johns and intervening appellants Williams and Consolidated (78 M.C.C. 723–726, 730–731). "On the basis of the evidence adduced in the Everts [and] Inland * * * proceedings," the Commission concluded that existing carriers could not meet the needs of the shippers and that the certificates awarded to Everts and Inland were, therefore, required by the public convenience and necessity (78 M.C.C. at 734–735, 763–764).

In the *Pierce Auto Lines* case, *supra*, this Court, rejecting a claim that grant of both of two carriers' applications was defective because the Commission had not made express findings "that there was a need for two through-line operations which would be in competition with one another", stated (327 U.S. at 530, 532):

> * * * there are two obvious answers. One is that the Commission, in making the separately stated findings, could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest. The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, including the competitive factors which the Commission inescapably had in mind. Only the most hypercritical reading of the findings, and one which ignores the report's explicit statements in many respects, could construe them as meaning only that *each* operation was required by public convenience and necessity without any regard to the competitive consequences of granting *both*. The Commission should not be required to rewrite its report simply to say, redundantly we think, that *both* operations, as well as each, are required by public convenience and necessity.

2. Appellants also urge that the Commission, in consolidating the ten applications and disposing of them in a single report, improperly considered evidence not of record in the Everts and Inland proceedings when it approved their respective applications. However, they point to no specific finding based on evidence not in the Everts or Inland records. Moreover, the report reveals that the Commission carefully considered the individual merits of each application and gave the several applications only such joint consideration as was obviously appropriate and required by the common questions they presented. See *United*

States v. Pierce Auto Freight Lines, supra, 327 U.S. at 529–530.

The Commission expressly referred in its report to contentions that Division 1, in deciding some of the proceedings before it, had used the evidence adduced in other cases (78 M.C.C. at 720). It stated that, as a matter of general policy, it would consider the evidence and reach its conclusions with respect to each applicant separately (*ibid.*). It made an exception, however, in the case of the applications filed by Everts, Inland and another applicant, Pacific Truck Service, to which it gave some joint consideration in view of the fact that these three applicants supported one another by proposing "to augment their individual capacity to provide service, if the need arises, by sharing equipment and terminal facilities" (*id.* at 721).

Even with respect to these three applicants the Commission set out separately the proposals and qualifications of each applicant, the evidence as to the need for its proposed service, and the contentions of the opposing carriers (*id.* at 720, 726, 731). And although the Commission, after analyzing the individual merits of each application, also discussed and made conclusions on certain "common issues presented [by the applications] as a whole (*id.* at 762), it again stressed that "[i]n reaching these [common] conclusions, we have given separate consideration to the evidence presented in each proceeding and to the arguments and contentions of the parties therein" and that "[i]n arriving at our conclusions as to a need

for the service of each applicant, we have, of course, taken into consideration the operating authorities and ability to serve of existing carriers" (78 M.C.C. 762). It is clear, therefore, that the Commission in this case acted with the utmost circumspection to segregate the individual and group aspects of the problem before it, and that the procedure it followed was appropriate.

3. Appellants complain of an alleged shift in policy by the Commission, which they purportedly had no opportunity to meet. However, they show no such change in the standards applied for determining whether grant of an application would serve the public convenience and necessity. The areas of certification (particularly with respect to some of the grantees other than Everts and Inland) are extensive, but the Commission has made as broad or broader awards in a substantial number of other proceedings. Nor is there anything unique in the consideration given to the grant of services to compete with the "virtual monopoly in the transportation of chemicals in the four Pacific Northwest States" which St. Johns previously enjoyed (78 M.C.C. at 734).

Finally, it is clear that, to the extent appellants are contending (J.S. 12) that the Commission's "policy shift" is reflected in the alleged failure to place the burden on the appellants to demonstrate the need for their proposed service or its alleged failure to consider the impact of the grants upon existing carriers (see pp. 2–5, *supra*), they are merely arguing the evidentiary questions which the court below expressly resolved against them. The Commission, in fact, applied settled criteria in determining that the Everts

and Inland applications should be granted, and it did so upon the basis of clearly substantial evidence of record. Appellants have shown nothing to the contrary.

CONCLUSION

It is respectfully submitted that the appeal presents no substantial question warranting further review and that the judgment of the district court should be affirmed.

Respectfully submitted.

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JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal from the United States District Court for the District of Oregon

REPLY TO MOTIONS TO AFFIRM

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In the Supreme Court
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No. 337

St. Johns Motor Express Co., *Appellant*, and James J. Williams, Inc., and Consolidated Freightways, Inc., *Intervening Appellants*,

v.

United States or America, *Appellee*, and Interstate Commerce Commission, Everts' Commercial Transport, Inc., and Inland Petroleum Transportation Company, Inc., *Intervening Appellees*.

REPLY TO MOTIONS TO AFFIRM

The Appellees have filed motions to affirm under Rule 16, paragraph 1 (c) the Revised Rules of this Court.

The intervening Appellees appear to have misconstrued this rule. It reads as follows:

> "(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Under the rule, it would appear that contentions relative to the history of the motor carrier litigants, and allegations of equity, as dwelt on by intervening Appellees are amiss, as likewise would a reply by us to those contentions and allegations.

The intervening Appellants also place reliance upon a contention that the single judge in denying Appellant's motion for a temporary restraining order passed upon all elements of this appeal. While we disagree with this contention, yet arguendo it is beside the point. The single judge had no authority to pass upon the merits of the proceeding, but could pass only upon the propriety of the issuance of the temporary restraining order. See 28 U.S.C.A. 2325, 2284. In *Ex Parte Metropolitan Water Co.*, 220 U.S. 539 (also 31 S. Ct. 600, 55 L. Ed. 575), it was held at 545:

> "Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right of such injunction."

See also *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S. Ct. 349, 66 L. Ed. 671; *Ex Parte Northern Pacific R. Co.*, 280 U.S. 142, 144; *Stratton v. St. L. S. W. Ry. Co.*, 282 U.S. 10,15.

This is not an appeal from the denial of a temporary restraining order by the single judge, but from the judgment of the three-judge court sustaining an order of the

Interstate Commerce Commission, as set forth in the Jurisdictional Statement, Appendix A, page 15.

The attempt to allege that the single judge passed upon the questions raised on this appeal is not only erroneous from its content, but even if so, would not correct the failure of the duly constituted court to do so.

Turning to the sole question of whether this appeal involves substantial or unsubstantial questions, we were unable to locate many decisions on the precise point.

In *Herzog v. United States;* 75 S. Ct. 349, the proceeding involved the allowance of bail and the consequent determination of the meaning of "substantial question." Mr. Justice Douglas, sitting as a Circuit Justice, held at page 350:

> "When, therefore, the issue is whether a 'substantial question' is presented within the meaning of Rule 46(a) (2), the first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail. If the question were one presented by a petition for certiorari to this Court and I were asked to grant a stay, I would grant it despite my own convictions on the merits, once I felt that any of my Brethren would be impressed with the argument. Though there were only one likely protagonist of that view on the Court, I would feel that the question should be saved for decision by the entire bench. The fact that one judge would be likely to see merit in the contention is likewise enough to indicate its substantiality for the purpose of Rule 46(a) (2). * * *"

"Substantial question" has been defined in many cases as a "debatable" question. See *D'Aquino v. U. S.*, 180 Fed. (2d) 271; *U. S. v. Barbeau*, 92 Fed. Supp. 196; *Brandt v. U. S.*, 110 Fed. Supp. 623, 627.

It is true that the cases cited relate to the definition of "substantial question" as contained in a rule of criminal procedure. However, they were the best legal sources to throw light upon the definition of "unsubstantial question." Academically, the holding of the cited cases is sustained. Both Webster's International Dictionary and the courts hold that "unsubstantial" means "not substantial," or "wanting matter of substance."

Rule 16, paragraph 1(c) is a relatively new rule. There have been no decisions, that we could find, defining the phrase "unsubstantial question" as therein contained. It would appear that this proceeding would give the Court an opportunity to define the subject phrase.

Turning to the contentions of the Appellees, it is apparent that they disagree with us. Their disagreement and their attempts of distinguishment establish that the questions presented by us are debatable.

1. The Appellees first concede that, "the Commission is, of course, required to consider the National Transportation Policy in any licensing proceedings" (pages 3-4 of Government Motion) and "admittedly, everything the Commission does must comply with the national transportation policy" (page 9 of intervenor Everts' motion).

They then seek to avoid their own concurrence by stating that the National Transportation Policy appears

in the Motor Carrier Act only with respect to contract carriers.

It is of interest to note that when the Transportation Act of 1940 (which included the National Transportation Policy) was enacted the words "and the national transportation policy declared in the Interstate Commerce Act" were substituted in Section 209(b) (Contract Carrier permit section), in lieu of the former language, to-wit: "and the policy declared in Section 202(a) of this part."

It can hardly be said that Congress meant by its mere substitution of words, necessitated by the concurrent repeal of Section 202(a) to emasculate and render nullatory the express words in the National Transportation Policy: "* * * All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 207 of the Motor Carrier Act (Sec. 307, 49 U.S.C.), the public convenience and necessity section, is inescapably a part of the Act and the Commission clearly erred in excusing its not making a finding by saying: "* * * Such a finding is appropriate only in granting motor contract carrier authority." (78 M.C.C. at page 764).

By such a view the Commission ignores the Congressional mandate that it foster and promote sound economic conditions in transportation among the several carriers and preserve a national transportation system. It is saying, in effect, that we are only required to adhere to the National Transportation Policy in operating

authority proceedings involving contract carrier applications.

It is apparent that (1) operating rights, be they those of railroad, water carrier, motor common carrier or motor contract carrier, and (2) rates, figuratively, and respectively, comprise the backbone and the body of transportation regulation. Yet, the Commission and the Appellees, relative to the procurement of operating authority, would only apply the National Transportation Policy to motor contract carriers.

This Court in *Texas & New Orleans R. R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479, 47 S. Ct. 361, 362, 72 L. Ed. 661, long ago pronounced the purpose of public convenience and necessity statutes in stating, page 479:

> " * * * The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. (Citing numerous cases)."

Here, the Commission thought so little of such purpose that it made no finding concerning it.

As if recognizing that their own argument lacks the qualities of soundness and persuasion, the Appellees next assert that the Commission did consider the National Transportation Policy and did make the requisite basic findings. To support this contention, they recite that the Commission said:

"We have, of course, constantly kept in mind

> our responsibilities under the National Transportation Policy."

Appellees rely upon such language of the Commission to meet the contention in our Jurisdictional Statement that the Commission "made no finding as to whether the grant of the additional authority would, or would not, have any effect upon the existing transportation system." (J. S. 7)

The Commission's mere assertion that it complied with the Congressional mandate is a mere claim on words and obviously is insufficient.

In *Atchison Ry. Co. v. U. S.*, 295 U.S. 201-202, this Court stated:

> " * * * This court will not search the record to ascertain whether by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained: *Florida v. United States*, 282 U. S. 194, 215. Recently, this Court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States*, 282 U.S. 74, 86; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U.S. 320, 341."

In one of the cited cases, *Beaumont*, 282 U.S. 74, at page 86, the Court stated that the Commission' failure specifically to report the facts and make findings was just as much in error as if a lower court had similarly failed to make specific requisite findings.

See also *City of Yonkers v. U. S.*, 320 U.S. 685, 64 S. Ct. 327, 88 L. Ed. 400; *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 65 S. Ct. 580, 89 L. Ed. 1235.

In the Order here under consideration, as stated, there is no finding as to what effect the grant of the authorities would have upon the maintenance of a sound transportation system. The state courts universally have recognized the necessity for some such conclusion as an element for public convenience and necessity certificates under state statutes. An extensive note covering decisions of the state courts on this question is to be found in 67 A.L.R. p. 957. The language of Section 207 of the Motor Carrier Act was taken virtually verbatim from the state statutes in existence at the time of the adoption of the Act. Concerning that language, Senator Wheeler, who had charge of the bill in the Senate, said this: "This is a provision which is in practically every State law at the present time. There was some objection to it, and a suggestion was made that we should not use the word 'future' in connection with 'public convenience and necessity', and that we should not use the words 'public convenience and necessity'. But those words have been adopted by almost every State in the Union where there is a law, they have been interpreted by the courts, and the committee felt that, while perhaps some other language might have been just as appropriate, nevertheless, that language having been construed by the courts, it would be unwise for the committee to write some other language in the law which would have to be passed upon by the courts." Congressional Record, Vol. 79, pt. 5,

p. 5653. (74th Cong. First Session.) The Commission itself has recognized the rule enunciated by the state courts, *Pan American Bus Company Application*, 1 M.C.C. 190, 203.

We cited several cases in our Jurisdictional Statement including *Schaffer Transportation Co. v. U. S.* 355 U.S. 83; *American Trucking Ass'n v. U. S.*, 344 U.S. 298; *King v. United States*, 344 U.S. 254; *Alabama G. S. R. Co. v. U. S.*, 340 U.S. 216; *United States v. Rock Island Motor Transport*, 340 U.S. 419, to support our position relative to our question or proposition 1 as set forth in our Jurisdictional Statement.

We nowhere asserted, and do not now assert, that the above specified cases or any others cited by us passed upon this precise question or proposition, which is:

> "1. Must the Interstate Commerce Commission consider, give weight to, make findings and discuss the National Transportation Policy, in public convenience and necessity proceedings, with respect to whether the proposed additional operating authorities, upon the evidence of record in each proceeding, would impair the ability to existing carriers to maintain a safe, adequate, economical and efficient service?"

We cited the subject cases to support our contention. We recognize that this Court has never to our knowledge, passed upon the precise question which we have presented. We are requesting this Court to pass upon this precise question. The cases cited are admittedly different on facts from those in the instant one, but were cited to establish by analogy that this Court, in

proceedings involving the National Transportation Policy, has uniformly required the Commission to make basic findings in accordance with that Congressional mandate.

The Appellees do not cite any decision reflecting that this Court has passed upon the application of the National Transportation Policy in the context here posed.

Their sole claim appears to be under the authority of *Luckenbach Steamship Co. v. United States*, 122 F. Supp. 824, affirmed per curiam 347 U.S. 984. They assert that the District Court there held that the Commission is not required to discuss *each* consideration expressed in the National Transportation Policy in every decision it renders, although they admit that the essential factors of that policy relating to the subject matter at hand must be followed. We have no disagreement with that assertion.

We agree that if the adversaries in the proceeding are not rival forms of transportation, i e., rail, motor, or water, but instead are solely either rail, motor, or water, the Commission is not required to consider, discuss, or make findings relative to the non-existent issue of the relative inherent advantages of rail, motor, or water carriers. Why discuss or make a finding relative to a factor which is non-existent? However, when the issue is, as was presented here from the beginning, the relation of the public interest to whether the authorization of additional services would impair existing services, the Commission should have made a finding. The *Luckenbach* case is not contrary to this position, but it is in support of it.

In the case relied upon by Appellees, the Court stated that the Commission need not make a finding concerning the national defense aspect of the National Transportation Policy, because the issue had not been raised. As stated, we agree, but as we likewise state, such was not the case here. The Commission in this proceeding failed to make a finding on a most prominent issue. It merely said, see supra, we do not have to make a finding relative to effect of the proposed grants upon existing carriers, although such was a predominant issue.

2. The Appellees next assert that the Commission did not consider evidence not of record in the *Everts* and *Inland* proceedings. However, they negate their statement by admitting (Government's motion, page 6) that the evidence of record in three separate proceedings was considered jointly. They justify this admission by asserting that the three applicant carriers, Everts, Inland and Pacific Truck, were supporting one another.

We stated in our Jurisdictional Statement, page 10, that the applications involved various numbers of witnesses, geographical areas and various but not uniform parties. These statements have not been denied or refuted. Clearly, the Commission could not escape the requirement of due process that nothing can be treated as evidence in a proceeding if not introduced in evidence in that proceeding, by saying since these carriers support one another we will treat their records together. The protesting carriers, who were not parties to one or more of the proceedings, and hence, were not participants to the evidence, could hardly have been said to have had their day in Court.

Furthermore, an examination of the report of the Commission, 78 M.C.C. 717, supplied by the Government as data supplementary to its motion, will reveal clearly that the majority of the Commission went outside of the individual records before it, in its ultimate finding and conclusion. For example, on pages 721-722 of its report (78 M.C.C.) the majority of the Commission sets forth the public evidence in the *Everts* proceeding. This evidence is succinctly summarized in the dissent of Commissioner Freas appearing at 78 M.C.C. 768, where he states:

> " * * * For example, in the Everts case, the report indicates that the four supporting shippers have specified only one point in Oregon, three points in Washington, seven points in California, and two points in Canada from which traffic may move. While it has generally been the practice in such instances to grant either point-to-point or point-to-area authority, as the case may warrant, nonradial authority is granted here to Everts between all points throughout California, Oregon and Washington. * * * "

While the majority of the Commission self-servingly asserts it considered only the evidence in each case, yet where did it have any substantial evidence in the *Everts* case, for example, upon which to predicate such a broad grant of authority?

3. In reference to the third question presented by Appellants, the Appellees merely state the Appellants "show no such change in the standards (of public convenience and necessity) for determining whether grant of an application would serve the public convenience and necessity" (Government's motion, page 7).

We reiterate that consistently prior to these proceedings the Commission itself had recognized (see Jurisdictional Statement 9) that it "must consider what effect, if any, an extension will have on present facilities and operating authorities (Jurisdictional Statement 9). Relying upon these factors, protestants in the *Everts* and *Inland* cases sought to develop the use by the shippers of their services and whether or not the respective shippers could state any reason why the existing services could not meet any present or foreseeable future need which such respective shippers had. The response to past use of the protestants by each shipper was negative. Likewise, the response from each shipper was uniform that he could not see any reason why protestants could not meet any present or reasonably foreseeable transportation need of his company, within the territory. The asking of these questions had long been the standard modus operandi by a protestant in public convenience and necessity proceedings. In the *Everts* and *Inland* cases the majority of the Commission abandoned and refused to give any effect to this long-established test, but instead, ignored such evidence of record.

It is significant that Appellee Everts, on page 29 of its motion, re-affirms these long-established criteria, which the majority of the Commission summarily abandoned for application in the *Everts* and *Inland* cases.

It is true as stated on page 7 of the Government's motion, that the Commission found that St. Johns enjoyed a virtual monopoly. However, such finding is at complete variance with the facts recited on pages

723-726 of the Commission's report (78 M.C.C.), where six existing motor carriers are identified. For some reason, the rail carrier protestants and their service were not identified, although of record.

4. The Government's motion does not refer to Appellant's fourth question relating to substantiality of supporting evidence. The intervening Appellees mention the point briefly.

In addition to what we have said in our Jurisdictional Statement, we refer to our argument, supra, in reference to the insufficiency of each record within its four corners to support the very broad grants of authority, which were made.

CONCLUSION

The questions presented by us are of far-reaching interest and consequence to the transportation industry, and to the public interest in the maintenance of the soundness of that industry. We respectfully hope that the Court will deny the motions to affirm and entertain this appeal in order that the Congressional mandate may be clarified in the context here presented.

It is respectfully submitted that the motions to affirm should be denied.

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JOHN M. HICKSON,
Failing Building,
Portland, Oregon.

WILLIAM B. ADAMS,
Pacific Building,
Portland 4, Oregon.

October 15, 1959.

CERTIFICATE OF SERVICE

I, William B. Adams, one of the attorneys for the appellants, hereby certify that on the 15th day of October, 1959, I served copies of the foregoing **REPLY TO MOTIONS TO AFFIRM** on the several parties of this appeal, as follows:

1. On the United States of America, appellee, by mailing copies, in duly addressed envelopes and airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., and John H. D. Wigger, Esq., Anti-Trust Division, Department of Justice, Washington 25, D. C., and by first-class postage prepaid to Clarence E. Luckey, Esq., United States Attorney, U. S. Court House, Portland, Oregon;

2. On the Interstate Commerce Commission, appellee, by mailing a copy in duly addressed envelope, with airmail postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On Inland Petroleum Transportation Company, Inc., appellee, by mailing a copy in duly addressed envelope with first-class postage prepaid, to Albert E. Stephan, Esq., 711 Center Building, Seattle 4, Washington, and on Everts' Commercial Transport, Inc., appellee, by mailing a copy in duly addressed envelope with first-class postage prepaid to Earle V. White, 2130 S. W. 5th Avenue, Portland 1, Oregon.

WILLIAM B. ADAMS